

Counter-Imperial Orientalism: Friedrich Berber and the Politics of International Law in Germany and India, 1920s-1960s

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Abstract:

The most trenchant critiques of Western international law are framed around the legacy of its historic complicity in the imperial project of governing non-European peoples. International law organised Europe and its 'others' into a hierarchy of civilizational difference that was only ever reconfigured but never overturned. But when analysing the complex relationship between international law and imperialism the differences within Europe—as opposed to a dyadic opposition of Europe versus the 'rest'—also matter. Within the historical and political constellations of the early and mid-twentieth century, German difference produced a set of arguments that challenged dominant discourses of international law by posturing as anti-imperial critique. This article focuses on the global career of Friedrich Berber (1898-1984) who, as a legal adviser in Nazi Germany and Nehru's India, was at the forefront of state-led challenges to liberal international law. Berber fused notions of German civilizational superiority with an appropriation of Indian colonial victimhood, and pursued a shared politics of opposition. He embodies a version of German-Indian entanglement which did not abate after the Second World War, emphasizing the long continuities of empire, power differentials, civilizational hierarchies and developmental logics under the umbrella of international law.

Keywords: internationalism; international law in Nazi Germany; international law in India; Friedrich Berber; postcolonial international law

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The legacy of colonial rule is a key theme in the history of modern international law. The colonial encounter was central to the emergence of international law as a discipline and as a practise among states. International lawyers formulated a 'standard of civilization' which effectively excluded non-Europeans from the community of sovereign states under international law unless they adopted Western forms of political organization. The mandates system of the League of Nations purported to lead colonised peoples to sovereignty after the First World War but only entrenched economic inequality, replacing overtly racist definitions of civilization with economic benchmarks of 'backwardness'. After the Second World War, international law offered only limited sovereignty to the 'underdeveloped' states emerging in the era of decolonization, thus ensuring continued dominance of the West over the 'rest'. Ultimately, as Antony Anghie and others have shown, imperialism remains so embedded in modern international law that it has never been overcome but only reconfigured.²

Nevertheless, postcolonial states continued to engage with international law, despite the limits to its universalism. Legal scholars have explained this with reference to the 'critical instability' at the heart of international law which is rooted in its promise to deliver justice and equality in the future, regardless of its deficiencies in the present. As Sundhya Pahuja has argued, "a universal orientation is unavoidable if there is to be law" but "even if the claim to universality is a familiar mode of power, it is nevertheless an unstable one, for it is always implanted with the seeds of its own excess".³ In this reading, international law helps to create the conditions for its own subversion, and it is the contention that international law can be both imperial and counter-imperial that lies at the heart of this article.

The relationship between international law and empire is complex for another reason: international law's standard of civilization also produced differences within Europe, notably after the First World War when decades of legal optimism about a 'civilized', European way of warfare came to an end.⁴ European imperialism and civilizational exceptionalism now provided a lexicon for scrutinising the belligerents' conduct, and the defeated German Empire stood at the centre of these debates. The Allies condemned German practices which, they argued, proved that it was not civilized enough to be a colonial ruler. Germans indignantly denied this but also began to imagine themselves as 'colonised' victims of an

² Antony Anghie, *Imperialism, sovereignty and the making of international law*, Cambridge: Cambridge University Press, 2005; Martti Koskenniemi, *The gentle civilizer of nations: the rise and fall of international law, 1870-1960*, Cambridge: Cambridge University Press, 2000; Lauren Benton, *A search for sovereignty: law and geography in European empires, 1400-1900*, New York: Cambridge University Press, 2010.

³ Sundhya Pahuja, *Decolonising international law: development, economic growth and the politics of universality*, Cambridge: Cambridge University Press, 2011, p. 41. See also Pahuja's perceptive review of Anghie in *Modern Law Review*, 69, 3, 2006, pp. 486-488.

⁴ Koskenniemi, *Gentle civilizer*, p. 87; Anghie, *Imperialism*, p. 189. For the war's destabilising impact see Robert Gerwarth and Erez Manela, eds., *Empires at war, 1911-1923*, New York: Oxford University Press, 2014.

inequitable new world order.⁵ This constellation made it possible for Germans to envisage a shared politics with others who challenged liberal empire and one of its political technologies, international law.

There was significant historical momentum behind this challenge. Cultural contacts with and scholarship on the 'East' provided a resource for Germans questioning conventional ideas about European civilisation in the course of the 19th century. India became an important reference point for them. German Indophilia and indology belonged to an Orientalist tradition which, as Suzanne Marchand has argued, entailed seeking connections with Eastern culture beyond a mere 'othering' of the East. Orientalism helped Germans carve out a distinct place in a European civilisation the unity of which was increasingly in question, certainly in the context of intensifying imperial rivalries from the 1880s onwards. Of course real power differentials underpinned German-Indian intellectual contact and exchange. After the First World War many Germans wanted to rejoin the ranks of colonial powers while Indians sought to throw off the yoke of imperial oppression. But Indians and Germans needed each other to pick away at Anglo-centric intellectual and political hegemony. As Kris Manjapra has shown, Indian nationalism gained from the exchange international recognition beyond the British Empire, while German Orientalism repudiated the idea of Western civilisation as anchored in the liberal democracies of Western Europe.⁶

This article analyses how Germans attempted to make the inherent paradox of international law, its imperialising and anti-imperial tendencies, work to effect geopolitical change in the context of German-Indian entanglements. I focus on the global career of Friedrich Berber (1898-1984) who as a scholar and legal adviser in Nazi Germany and Nehruvian India was at the forefront of state-led challenges to international law's mainstream. In some ways, Berber's biography represents a familiar story, marked by involvement in the Nazi regime and subsequent attempts to come to terms with this past. His activities between 1933 and 1945 have attracted some scholarly attention but compared to well-known Nazi jurists such as Carl Schmitt or Werner Best Berber remains an obscure figure.⁷ Yet the Anglo-world loomed large in Berber's life. His membership in transnational

⁵ John N. Horne and Alan Kramer, *German atrocities, 1914: a history of denial*, New Haven: Yale University Press, 2001, pp. 216-223; Uta Poiger, 'Imperialism and empire in twentieth-century Germany', *History and Memory*, 17, 1, 2005, pp. 117-143, at p. 122.

⁶ Suzanne Marchand, *German Orientalism in the age of empire: religion, race, and scholarship*, Cambridge: Cambridge University Press, 2009; Kris Manjapra, *Age of entanglement: German and Indian intellectuals across empire*, Cambridge, Mass.: Harvard University Press, 2014.

⁷ Reinhard Mehring, *Carl Schmitt: Aufstieg und Fall*, Munich: C.H. Beck, 2009; Ulrich Herbert, *Best: Biographische Studien über Radikalismus, Weltanschauung und Vernunft, 1903-1989*, Bonn: Dietz, 1996; on Berber see Carl H. Paußmeyer, 'Die Grundlagen nationalsozialistischer Völkerrechtstheorie als ideologischer Rahmen für die Geschichte des Instituts für Auswärtige Politik, 1933-1945', in Klaus Jürgen Gantzel, ed.,

networks centred on Britain and the United States positioned him between those who dominated the international legal order and those in opposition. These connections also enabled him to implement legal knowledge in the Global South in the 1950s by advising India on a water dispute with Pakistan.

Berber was not an anti-imperialist. His position may more accurately be characterised as counter-imperial, proposing an alternative way of Eurocentric ordering, as he first appropriated Indian colonial victimhood to carve out a distinct position within Europe's own struggles about the meaning of Western sovereignty, and then put forward a vision of supranational organisation that cast Germany as a civiliser apart from other Western powers. It was as a representative of the West that Berber advised Nehru's government and his attitudes to India were deeply Orientalist. Berber's oppositional legal knowledge emerged out of a specific political constellation that enabled him to challenge accepted norms of international law both during the Third Reich and the post-war period of 'decolonization'.⁸ Ultimately, his trajectory points towards the necessity of writing a history of international law that is not limited by a dualistic framing of 'West' versus 'rest', and takes seriously the complex and contradictory orderings that result from its imperial legacy.

Law and empire after 1919

It is hard to over-emphasise the devastating impact of the First World War on the credibility of Eurocentric international law. "The late war", wrote an Indian observer "was waged in contravention of the accepted law of nations and in defiance of all notions of international morality". Not only were European states caught flouting international law, those who professed to be able to say what international law actually was had been exposed as fantasists. "The practice among states is thus contrary to the high-sounding theories of publicists, prize courts, congresses and conferences." This conclusion inspired legal scholars in India to recover indigenous traditions of international law based on ancient practise, for instance the doctrine of equity, justice and good conscience. Indirectly, their accounts contrasted legal order in India with European anarchy. Descriptions of ancient

Kolonialrechtswissenschaft, Kriegsursachenforschung, Internationale Angelegenheiten: Materialien und Interpretationen zur Geschichte des Instituts für Internationale Angelegenheiten der Universität Hamburg, 1923-1983 im Widerstreit der Interessen, Baden-Baden: Nomos, 1983, pp. 115-158; Hermann Weber, 'Von Albrecht Mendelssohn-Bartholdy zu Ernst Forsthoff. Die Hamburger Rechtsfakultät im Zeitpunkt des Machtübergangs 1933 bis 1935' in Gantzel, *Kolonialrechtswissenschaft, Kriegsursachenforschung, Internationale Angelegenheiten*, pp. 159-181; Hermann Weber, 'Rechtswissenschaft im Dienst der NS-Propaganda. Das Institut für Auswärtige Politik und die deutsche Völkerrechtsdoktrin in den Jahren 1933 bis 1945', in Klaus Jürgen Gantzel, ed., *Wissenschaftliche Verantwortung und Politische Macht, Hamburger Beiträge zur Wissenschaftsgeschichte 2*, Berlin: Reimer, 1986, pp. 185-425; on *Vergangenheitsbewältigung* see Philipp Gassert and Alan E. Steinweis, eds., *Coping with the Nazi past: West German debates on Nazism and generational conflict, 1955/1975*, New York; Oxford: Berghahn, 2006.

⁸ International law's continued imperial ordering necessitates a critical use of the term.

Indian laws that enshrined respect for enemy property and sites of religious worship invoked images of European outrages such as the shelling of Rheims cathedral by the German army.⁹ Indian legal scholars hardly differentiated between violations of international law by the Entente and the Central Powers. The point was that the way European powers had behaved in wartime made the idea that they were fit to spread civilization in their colonies highly dubious.

Among European and American observers the principal outlaw in the war had been Germany. Its violation of the neutrality of Belgium and Luxembourg, the atrocities it committed against civilians and prisoners of war, and its use of new weapons were roundly condemned by Allies and neutrals. Moreover, Germany's reliance on military necessity as an excuse for flouting the laws of war radically challenged international legal universalism. If, as German jurists and politicians argued, states had to be free to pursue their interests unhindered by law, a German victory in the First World War would have created a lawless world. The Allies did not escape with their reputations as law-abiding powers entirely intact. Britain's blockade of the Central Powers was controversial even if some scholars have recently interpreted it as legal innovation.¹⁰ It is fair to say, though, that Germany comprehensively lost the legal argument during the First World War.

Defeat in war also cost Germany its empire. It lost colonies and concessions in Africa, the Pacific and China as well as its contiguous imperial holdings in Europe. As a result, Germany became the first postcolonial European nation in a world still structured by colonialism. The Allied occupation of the Rhineland inverted accepted civilizational hierarchies and many Germans supported a racist campaign against the stationing of African soldiers in France's zone of occupation. In German eyes, a *Kulturvolk* was being 'colonized'.¹¹ Germany's distinct experience of imposed decolonisation gave rise to a Eurocentric critique of colonialism that assessed other European powers according to their ability to civilise their colonial subjects and simultaneously portrayed Germany as the colonized victim.

⁹ S.V. Viswanatha, *International law in ancient India*, Bombay: Longmans, 1925, quotes at pp. 3-4; Pramathanath Bandyopadhyay, *International law and custom in ancient India*, Calcutta: Calcutta University Press, 1920; Bimal Patel, 'India', in Bardo Fassbender and Anne Peters, *The Oxford handbook of the history of international law*, Oxford: Oxford University Press, 2012, pp. 500-521.

¹⁰ Isabel V. Hull, *A scrap of paper: breaking and making international law during the Great War*, Ithaca: Cornell University Press, 2014.

¹¹ Marcia Klotz, 'The Weimar Republic: a postcolonial state in a still-colonial world', in Eric Ames, Marcia Klotz and Lora Wildenthal, eds., *Germany's colonial pasts*, Lincoln: University of Nebraska Press, 2005, pp. 135-147; Julia Roos, 'Women's rights, nationalist anxiety, and the "moral" agenda in the early Weimar Republic: revisiting the "black horror" campaign against France's African occupation troops', *Central European History*, 42, 3, 2009, pp. 473-508; Dirk van Laak, *Imperiale Infrastruktur: Deutsche Planungen für eine Erschließung Afrikas 1880 bis 1960*, Paderborn: Schöningh, 2004, p. 210.

Friedrich (Fritz) Berber came of age during this time of destabilised imperial boundaries. Not yet twenty at the Armistice of 1918 Berber began his law studies in Munich, a centre of political radicalism. His earliest writings fused resentment against the Versailles *Diktat* with calls for solidarity among those oppressed by the 'West'. In a pamphlet published by a Christian youth group, Berber argued that the world's territory had to be distributed in an "equitable" way. "It is inequitable that a country with a declining population possesses an overabundance of colonies, whereas a rapidly growing people are deprived of all areas of settlement. This perspective on international politics means that, for instance, the question of Indian freedom is also our question, and the question of Versailles is that of the entire world." Asking for the restitution of German colonies in the same breath as campaigning for Indian national liberation may seem paradoxical. Berber, however, asserted that Germany's shameful treatment at the hands of the victors of the world war had made its population "suffer more deeply from the tragedy that exists all around us than elsewhere" and gave Germans a unique insight into world politics, distinct from that of other Europeans.¹² Berber was not alone in fusing sympathy for anticolonial movements with visions for a German colonial rebirth. Conservative publicists, for example, supported sizeable diasporic communities of Indian students and activists in Berlin and Munich.¹³

Religion was another influence on Berber. His father had been a preacher in the Methodist church, an isolated minority at odds with the quasi-religious nationalism of imperial Germany due to the church's links with foreign communities of faith.¹⁴ Berber's early thoughts on reforming international politics centred on individual spiritual renewal and "man, as he ought to be, man redeemed".¹⁵ As a student, Berber moved in reformist Christian circles and throughout his life remained open to alternative forms of spirituality. He became affiliated with the Anglophone Protestant ecumenical movement, joining the World's Student Christian Federation at the peak of its influence.¹⁶ He also forged contacts to the British Society of Friends (Quakers) and allegedly converted to Quakerism, possibly because its

¹² Fritz Berber, 'Von der Gerechtigkeit', in: *Zwischen den Bünden: Drei Vorträge aus dem Jugendring München*, Munich: Chr. Kaiser, 1924, pp. 24-37, quotes at p. 30, 35.

¹³ Manjapra, *Age of entanglement*, pp. 88-106, 162-163, 203-4.

¹⁴ Archives of Ludwig-Maximilians-Universität, Munich, NL-064, Friedrich Berber Papers (henceforth Berber Papers), birth certificate Berber. Karl Heinz Voigt, 'Die Methodistenkirche in Deutschland', in Karl Steckel and Carl Ernst Sommer, eds., *Geschichte der Evangelisch-methodistischen Kirche: Weg, Wesen und Auftrag des Methodismus unter besonderer Berücksichtigung der deutschsprachigen Länder Europas*, Göttingen: Edition Ruprecht, 2007, 3rd ed., pp. 85-112.

¹⁵ Berber, 'Von der Gerechtigkeit', p. 27.

¹⁶ Berber left a rather self-serving autobiography. Where possible, I have consulted other evidence. Friedrich Berber, *Zwischen Macht und Gewissen: Lebenserinnerungen*, Munich: C.H. Beck, 1986, pp. 25-38; on Protestant internationalism see Christopher Clark and Michael Ledger-Lomas, 'The Protestant International', in Abigail Green and Vincent Viaene, eds., *Religious internationals in the modern world: globalization and faith communities since 1750*, Houndmills: Palgrave Macmillan, 2012, pp. 23-52.

emphasis on the unmediated experience of Christ suited him.¹⁷ Such social connections enabled him to take extended study trips to the United States and Britain. After completing his law degree in 1926, Berber spent a year lecturing on international relations at a Quaker college in Birmingham, England. Having developed an interest in the problems of the British Empire as well as Gandhi's philosophy, Berber wrote a doctoral dissertation on the legal relationship between Britain and the Dominions in the Commonwealth.¹⁸

For an international lawyer interested in gradations of civilizational hierarchy, the mid-1920s British Empire and the legal equality between its constituent parts was a fascinating field of study. After the First World War the Dominions asserted their independence as they participated in the Paris Peace Conference and became full members of the League of Nations. The 1926 Balfour Declaration enshrined the principle of equality in inter-imperial relations but excluded India. A founding League member and thus an actor on the world stage, it had neither Dominion status nor self-government.¹⁹ Berber likened the League's tolerance of Indian inequality to "a council of free men [that] does not object to one of them bringing his slave along, dressed up as a free man, and thereby surreptitiously doubling his master's vote".²⁰ Indian nationalists also regarded the League as an instrument of colonial domination, which, according to Nehru, treated the "dependencies of an imperialist power" as "domestic matters" where international law did not apply.²¹ Relations between Britain and the Dominions had traditionally also been regarded as lying outside international law, a doctrine known as *inter se*. When Berber was writing his dissertation, however, *inter se* was breaking up, in particular due to Ireland's pressure.²² Britain's decision to withhold Dominion status from India was therefore a frustrating setback for advocates of Indian independence who had vested their hopes in international law.

Berber's other early work reveals ambivalence towards British approaches to sovereignty and empire. While he criticised the way the British Empire treated those it did not regard as equals, the non-white colonies, the Irish and the Boers, and unequivocally denounced India's colonial status, Berber lauded the non-coercive and organic nature of the

¹⁷ Arnold Toynbee, *Acquaintances*, London: Oxford University Press, 1967, p. 277.

¹⁸ Library of the Religious Society of Friends, London, Horace Alexander Papers (henceforth LSF-HA), Temp. MSS 577/20, Horace Alexander to Girja Shankar Bajpai, Ministry of External Affairs, 28 December 1950 (copy).

¹⁹ Stephen Legg, 'An international anomaly? Sovereignty, the League of Nations and India's princely geographies', *Journal of Historical Geography*, 43, 2014, pp. 96-110; William David McIntyre, *The Britannic vision: historians and the making of the British Commonwealth of Nations, 1907-48*, Basingstoke: Palgrave, 2009; Daniel Gorman, *The emergence of international society in the 1920s*, Cambridge: Cambridge University Press, 2012.

²⁰ Friedrich Berber, *Die Rechtsbeziehungen der britischen Dominions zum Mutterlande*, Ansbach: Brügel, 1929, p. 15.

²¹ R. P. Anand, 'The formation of international organizations and India: a historical study', *Leiden Journal of International Law*, 23, 1, 2010, pp. 5-21, at p. 14; see also Legg, 'International anomaly'.

²² Lorna Lloyd, 'Loosening the apron strings', *The Round Table*, 92, 369, 2003, pp. 279-303; Berber, *Rechtsbeziehungen*, p. 69.

British Commonwealth as an example of a peaceful loosening of imperial ties. To some extent liberal empire served as a blueprint for international government in Berber's thinking even if he clearly saw through its patterns of exclusion.²³ There were, he argued, different layers of hierarchy within imperial systems, and hybrid forms of sovereignty that emerged as a result. International legal structures served to reform and maintain empire precisely because they did not conform to the doctrine of sovereign equality.²⁴ The evolution of the British Commonwealth showed that it was possible to build a discrete community that was recognisable in international law. An inherent instability at the heart of imperial international law opened the door to competing universalisms and regional subsystems. This, Berber implied, might be something that Germany could take advantage of when it re-joined the ranks of colonial powers. The British model, however, was only of limited use as the German state was animated by a different kind of "spirit".²⁵

Regionalism was indeed a concept that some German jurists developed further in the 1930s and 1940s. Carl Schmitt, the best-known example, argued for a world order of large spaces (*Großraumordnung*), with Germany as the dominant power in a European *Großraum*. According to Schmitt, multiple co-existing regional hegemons were capable of providing order beyond classical international law's flawed universalism. Earlier in the twentieth century, the idea of regional legal orders had already been developed by Latin Americans who, as semi-peripheral actors, similarly fell through the fictitious categories of colonising nations and colonised non-nations and, like jurists on the Indian subcontinent, criticised the standard of civilization.²⁶ Berber's interpretation resembled the way semi-peripheral actors appropriated international law for their own ends in proposing a particularistic conception of universality.

With his unconventional interests, Berber's entry into German academia was not straightforward. Leaving a secure job as a state prosecutor in the Bavarian legal system, Berber began teaching at the German Academy for Politics (*Deutsche Hochschule für*

²³ Fritz Berber, 'Die Dezentralisation des Britischen Reiches als Problem demokratischer Selbstverwaltung', in Carl Schmitt et al., *Probleme der Demokratie*, Berlin: Rothschild, 1928, pp. 88-97.

²⁴ On British legal innovations that tried to deal with this problem see Benton, *Search for Sovereignty*; Karuna Mantena, *Alibis of Empire: Henry Maine and the ends of liberal imperialism*, Princeton, NJ: Princeton University Press, 2010.

²⁵ Berber, 'Dezentralisation', p. 97.

²⁶ Stephen Legg, ed., *Spatiality, sovereignty and Carl Schmitt: geographies of the nomos*, London: Routledge, 2011; Arnulf Becker Lorca, 'Universal international law: nineteenth-century histories of imposition and appropriation', *Harvard International Law Journal*, 51, 2, 2010, pp. 475-552; Liliana Obregón, 'Completing civilization: Creole consciousness and international law in nineteenth-century Latin America', in Anne Orford, ed., *International law and its others*, Cambridge: Cambridge University Press, 2006, pp. 247-264, esp. p. 248; Arnulf Becker Lorca, 'Eurocentrism in the history of international law', in Bardo Fassbender and Anne Peters, *The Oxford handbook of the history of international law*, Oxford: Oxford University Press, 2012, pp. 1034-1057.

Politik) in 1930, outside the regular university system.²⁷ The Berlin-based *Hochschule* had a cosmopolitan ethos, expressed in various international collaborations. At the time of Berber's arrival, however, its leadership had to accommodate political pressure from nationalist circles and tried to allay fears of Hitler's rise in the English-speaking world.²⁸ In Berlin, Berber made scholarly contacts such as Rudolf Smend, Hermann Heller and Erich Kaufmann, the latter a proponent of natural law and legal adviser to the German Foreign Ministry. Like many Weimar jurists these scholars opposed legal positivism, a definition of law which restricted its sources to expressly recognised rules. According to anti-positivists this reduced the state to abstract norms bereft of their historical, political or ethical contexts, and produced an artificial separation of law and morality. Anti-positivism allowed scholars to blend law and policy. For international lawyers, heavily invested in a critique of the Versailles Treaty, this was appealing.²⁹

In the Third Reich, many of Berber's mentors lost their academic posts due to racial or political persecution but he did not.³⁰ Erich Kaufmann, for instance, was driven from his professorship because of his Jewish ancestry. Just before fleeing Germany in 1938 a desperate Kaufmann wrote to a friend, telling him that scholars still met at his house to discuss law and politics but not many were left from the Weimar days, "certainly not Fritz B".³¹ Berber prospered under the Nazis. He was in touch with officials of the regime by August 1933 and there was a prospect of him being "called to more important work", according to a British Quaker in whom Berber confided.³² In the years leading up to the Second World War, Berber furnished Hitler's aggressive policies with legal arguments that drew on his earlier critique of liberal empire and rejection of legal positivism.

Legalising Hitler's empire

Deploying law as a political weapon was a pillar of Nazi rule. The vast majority of German jurists who did not emigrate willingly cooperated with the regime. They challenged neither the Nazis' euthanasia programme, nor the concentration camp system, nor the legal

²⁷ Berber Papers, letter granting demission, 23 July 1930.

²⁸ Steven D. Korenblat, 'A school for the republic? Cosmopolitans and their enemies at the Deutsche Hochschule für Politik, 1920-1933', *Central European History*, 39, 3, 2006, pp. 394-430.

²⁹ Berber, *Lebenserinnerungen*, p. 53; Frieder Günther, *Denken vom Staat her: die bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration, 1949-1970*, Munich: Oldenbourg, 2004, pp. 34-47; Michael Stolleis, *A history of public law in Germany, 1914-1945*, transl. Thomas Dunlap, Oxford: Oxford University Press, 2004, pp. 164-168.

³⁰ Mehring, *Schmitt*, pp. 313-315.

³¹ Arnold Wolfers Papers, Stirling Memorial Library, Yale University, Box 2, Folder 21, Kaufmann to Wolfers, 7 June 1938.

³² Geoffrey Carnall, *Gandhi's interpreter: a life of Horace Alexander*, Edinburgh: Edinburgh University Press, 2010, p. 108, quoting Alexander.

persecution of Jews and other minorities.³³ No aspect of the German legal system remained unaffected by Nazi ideology and international law was no exception. Otto Koellreutter, a prominent administrative lawyer and enthusiastic Nazi supporter, regarded it as “the most political part of the legal order”.³⁴

Initially the regime embraced traditionalist conceptions that emphasised state sovereignty, self-determination and the equality of states. As Hitler’s foreign policy moved from acknowledging international law between 1933 and 1935, to selectively breaking it between 1935 and 1938 (rearmament, reoccupation of the Rhineland), and from then on denouncing its core claims by attacking the sovereignty of other states (Austria, Czechoslovakia), the divisions between conservative traditionalists and Nazi radicals crystallised. The latter substituted states with racial groups as the principal subjects of international law. As the norms governing German foreign relations had to emanate from the interests of the German people (*Volk*), binding rules could only exist where these interests coincided with generally accepted state behaviour. In practise, this interpretation justified disregarding international treaties and during the Second World War provided an apology for annihilationist warfare. The Nazi vision for international law meant the end of universality and created an inside/outside dichotomy which, as Michael Stolleis has observed, was not dissimilar to that of imperial international law’s standard of civilization, although it was overtly, instead of covertly, annihilationist.³⁵

Berber joined the collective attempt by German jurists in the Third Reich to underpin Nazi rule with a coherent science of the state. He furthered his career as a member of relevant Nazi institutions (*NS Rechtswahrerbund*, *NS Dozentenbund*) and in 1937 entered the Nazi party.³⁶ Within a few years of Hitler’s rise to power, Berber moved to the centre of Nazi foreign policy making, working at the intersection of international legal scholarship and propaganda. In 1934, Goebbels, the head of the Nazi Propaganda Ministry, put Berber in charge of a new department for international law and international relations at the *Hochschule*, instructing him to rebuild its international network.³⁷ Within a year, Berber became a protégé of foreign minister Joachim von Ribbentrop. In 1935, he was appointed acting director of the Hamburg *Institut für Auswärtige Politik* (Institute for Foreign Policy), the first German research body for international relations. Berber transferred it to Berlin to form

³³ Ingo Müller, *Hitler's justice: the courts of the Third Reich*, transl. Deborah Lucas Schneider, Cambridge, Mass.: Harvard University Press, 1991.

³⁴ Archives of Ludwig-Maximilians-Universität, Munich (henceforth LMU), Sen-I-30, Koellreutter to Vice Chancellor, 11 December 1936 (copy); on Koellreutter see Stolleis, *History of public law*, pp. 327-31.

³⁵ Detlev Vagts, ‘International Law in the Third Reich’, *American Journal of International Law*, 84, 3, 1990, pp. 661-704; Stolleis, *History of public law*, pp. 410-415.

³⁶ Berber Papers, certificate of denazification, 31 January 1949; Ernst Klee, *Das Personenlexikon zum Dritten Reich: Wer war was vor und nach 1945*, Frankfurt a. M.: Fischer, 2003, 2nd ed., p. 39.

³⁷ LSF-HA, Temp. MSS 577/98, Berber to Alexander, 10 May 1934; Carnall, *Gandhi's Interpreter*, p. 113.

another foreign policy institute in 1937. Ribbentrop, who wanted to integrate research and propaganda functions, rewarded Berber with a professorship at the University of Berlin.³⁸ Berber also became a contributor to a key journal published by SS jurists that legitimated genocide.³⁹

While Berber was institutionally committed to National Socialism, his ideological adherence to the party line was questioned. Among the positions that German international lawyers embraced under the Nazis his might best be described as that of a liberal nationalist trying to adjust to new realities. Committed Nazis eyed him with suspicion and when he was considered for a professorial appointment in 1936 he was found to lack a “National-Socialist personality that was above challenge”. The assessment was based partly on Berber’s 1934 study *Sicherheit und Gerechtigkeit* (Security and Justice).⁴⁰ With this book, which Berber described to a Quaker friend as giving “a strong expression to the new German Peace conception outside the League of Nations”, he hoped to establish his academic reputation, even planning for an English translation.⁴¹

A polemic against liberal international law written in a religious key, the book’s argument can be summarised as follows: after the First World War, international law took a “soteriological” turn and became a quasi-theological theory of salvation. It encroached on areas which had hitherto been a part of international politics, notably the right to wage war. This new international law promoted the idea that inter-state conflict represented nothing but differences in opinion over how to interpret legal rules and constructed a “utopia” in which “all appearing conflicts are only disagreements about the interpretation of law which can be solved by a court operating under predictable certainty; these are attempts to turn world history into world adjudication, to turn domestic politics into constitutional jurisdiction”. Quoting Schmitt, Berber argued that such a “total legal order” (*universelles Ordnungsprogramm*) did not promote world peace but benefitted the victors of the world war by enshrining an unequal status quo as a universal order under the watchword of ‘security’.⁴² These points were compatible with a traditionalist interpretation of international law as they emphasised Germany’s subdued position among European powers and the limitations of the League.

Berber took this critique further by arguing that soteriological international law was based on a disenchanting rationality. “It is of key importance for the post-war soteriology that

³⁸ Weber, ‘Rechtswissenschaft’, pp. 250-253, 255, 260-265, 381.

³⁹ Herbert, *Best*, pp. 279-286.

⁴⁰ LMU, Sen-I-30, Vice Dean Edmund Mezger to Vice Chancellor, 8 December 1936 (copy), encl. report Fritz Reu, 5 December 1936; see also Gideon Botsch, *“Politische Wissenschaft” im Zweiten Weltkrieg: Die “deutschen Auslandswissenschaften” im Einsatz, 1940-1945*, Paderborn: Schöningh, 2006, p. 263.

⁴¹ LSF-HA, Temp. MSS 577/98, Berber to Alexander, 4 May 1934.

⁴² Friedrich Berber, *Sicherheit und Gerechtigkeit: Eine allgemeinverständliche Einführung in die Hauptprobleme der Völkerrechtspolitik*, Berlin: Carl Heymanns, 1934, pp. 4, 26.

salvation has not been based on subjectivity but objectivity: not a radically new ethos but a radically new global organisation; the centre of this new soteriology is not theology or ethics but the law as the rational form of organisation for humankind.” This, according to Berber, was not surprising, as “we have known since Max Weber that recent European history is distinct among all cultures in its attempt to disenchant the demonical possessions and irrationalities of life and to master them rationally”.⁴³ Democracy represented the attempt to rationalise the power of the state. The (fateful) democratic control of foreign policy and the international legal control of state sovereignty were thus inextricably linked.

But, and here Berber made a rhetorical move that positioned Germany outside the West, “the monopoly of the Western powers on a post-war soteriology was broken in front of the entire world; the soteriological character of German radical nationalism became apparent, but in a significantly harder, bitterer and more disillusioned key: German soteriology is not based on the unease of the disappointed victor or the new owner’s bad conscience but the plight of a beaten, humiliated, tormented and *Lebensraum*-deprived great and proud *Volk*.” German soteriology was built on *völkisch* assertiveness, not abstract rules, which only left a “modest role” for international law as a sometime “agent of justice”: “justice is a matter of mastery; it is the great art of tact and of wisdom in political matters, which, in a rationalistic, mechanistic and materialistic age has almost completely been lost”.⁴⁴ By insisting on the existence of an elusive justice, which only subaltern Germans could grasp, Berber performed a kind of “self-Orientalization” that found its parallels in coterminous discussions among German geo-politicians.⁴⁵ Anti-colonial nationalists, for their part, rarely believed that European fascism had anything to offer to colonial peoples. Nehru, for example, regarded fascism and imperialism as variants of the same ideology.⁴⁶

At the same time Berber recommended exploiting international law to project an alternative political philosophy. Berber called this approach the “politics of international law” (*Völkerrechtspolitik*). Anticipating Schmitt, who declared a “war of international legal studies” (*völkerrechtswissenschaftlicher Kampf*) on universalist international law, Berber argued that international law was, and should be, inherently political.⁴⁷ Berber said little about the actual political values a reformed international law should be based on. He did not provide a definition of international justice, the norm destined to take the place of security. What justice

⁴³ Berber, *Sicherheit und Gerechtigkeit*, p. 30.

⁴⁴ Ibid., pp. 29, 164.

⁴⁵ Manjapra, *Age of entanglement*, p. 202.

⁴⁶ Ramachandra Guha, *India after Gandhi: the history of the world’s largest democracy*, Basingstoke: Macmillan, 2007, p. 152. Note, though, Subhas Chandra Bose’s failed attempt to gain Nazi support for Indian independence.

⁴⁷ Schmitt cited in Urs Matthias Zachmann, ‘Race and international law in Japan’s New Order in East Asia, 1938-1945’ in Rotem Kowner, Walter Demel, eds., *Race and racism in modern East Asia: Western and Eastern constructions*, Leiden: Brill, 2013, p. 454; Berber, *Sicherheit und Gerechtigkeit*, p. 158.

was would be determined on the grounds of political realities and “scholarship” would put its “counsel at the disposal of political practice”. Elite Anglo-American think tanks served as models for effective political work in international law.⁴⁸ Blending liberal internationalist techniques with Nazi foreign policy aims, Berber discounted universal international law as a decisive force in international politics and anticipated the disciplinary turn to international relations which would be completed by other lawyers of his generation, notably Hans Morgenthau.⁴⁹

Sicherheit und Gerechtigkeit was a highly ambiguous study and it was received accordingly. There were damning reviews by Nazi lawyers who doubted that Berber’s conception of international law could deliver for the Nazi state.⁵⁰ Emigré scholars regarded the book as a foundational text of Nazi legal scholarship.⁵¹ An American reviewer conceded that Berber was right in his diagnosis of the current fragile state of international law but diagnosed a “typically National Socialist conception of international law” in the rejection of international institutions.⁵² One British supporter of appeasement, E.H. Carr, quoted the book favourably in his seminal realist international relations text *The Twenty Years’ Crisis*.⁵³ In his emphasis on the state as the basic entity of international relations, Berber formulated a core claim of the realist school as it was developed by Carr and others.⁵⁴ For all its contradictions, the book spoke to a broad political spectrum and it enhanced Berber’s reputation abroad.

To understand how Berber’s critique of international law translated into politics it is important to analyse his propaganda work from the mid-1930s. Berber published numerous articles and document editions defending Hitler’s foreign policy as compliant with

⁴⁸ Ibid., pp. 41, 143, 160. Anglo-American think tanks shared Berber’s distrust of popular influence on foreign policy, see e.g. Rockefeller Foundation Archives, Rockefeller Archive Center, Sleepy Hollow (henceforth RF), RG 1.1, series 200, box 356, folder 4223, J.B. Condliffe, ‘International Collaboration in the Study of International Relations’, paper given at 1930 International Studies Conference.

⁴⁹ Christoph Frei, *Hans J. Morgenthau: an intellectual biography* (Baton Rouge: Louisiana State University Press, 2001); Koskeniemi, *Gentle civilizer*, chap. 6.

⁵⁰ Reviews in *Deutsches Recht*, 10 March 1935, p. 133 and *Kritische Umschau*, quoted in LMU L-X-3a, Bd.4, curriculum vitae Berber, 7 June 1953.

⁵¹ Eduard Bristler [John Herz], *Die Völkerrechtslehre des Nationalsozialismus*, Zurich: Europa-Verlag, 1938, pp. 57-58.

⁵² Josef L. Kunz, *American Journal of International Law*, 29, 1935, p. 350.

⁵³ E.H. Carr, *The twenty years’ crisis, 1919-1939: an introduction to the study of international relations*, 2nd ed. [1946], Basingstoke: Palgrave, 2001, pp. 165-167. On Carr and appeasement see Lucian Ashworth, *International relations and the Labour Party: intellectuals and policy making from 1918-1945*, London: Tauris Academic Studies, 2007, pp. 21-22.

⁵⁴ On realism’s affinity for Nazi thinkers see Philip Mirowski, ‘Realism and neoliberalism: from reactionary modernism to postwar conservatism’, in Nicolas Guilhot, ed., *The invention of international relations theory: the Rockefeller Foundation and the 1954 conference on theory*, New York: Columbia University Press, 2011, pp. 210-238.

international law.⁵⁵ In a 1936 lecture to foreign students he justified German rearmament and the re-occupation of the Rhineland as a reaction to the Western powers' failure to honour their promise to disarm. This turned Hitler's unilateral abrogation of international treaties into norm-creating acts.⁵⁶ Berber also kept a watchful eye on the liberal empires' relationship with the League, revelling in the legal quandaries that the British and French governments found themselves in during the Abyssinia Crisis when neither intended to apply Article 16 of the League Covenant against the Italian aggressor as it went against their interests. Legality, a hallmark of the post-1919 order, had come back to bite its creators as "it is the *ruse* of law that, born out of a concrete constellation of interests, it can, because it is formulated generally, become a weapon for and against anybody to whom the prerequisites apply".⁵⁷

The 1930s were a decade of crisis for international law and institutions and Berber's analysis found admirers among disaffected liberal internationalists and legal sceptics abroad. He successfully targeted Anglophone elites and their think tanks, using League of Nations-affiliated institutions, and building on his insights into the increased importance of objectivity and rationality in the foreign policy making of modern liberal democracies. This distinguished him from his peers in the German legal community. Berber used the network of the International Studies Conference (ISC), a federation of foreign policy research institutes and think tanks which held annual conferences under the auspices of the League of Nations between 1928 and 1939. Both the Hamburg and the Berlin institutes had been founder members but disaffiliated when Germany left the League in 1933.⁵⁸ Berber now reversed this process. He attended the 1935 International Studies Conference in London as an observer and ensured that his Berlin institute became a corresponding member of the ISC.⁵⁹ He and his staff continued to participate in the conferences, and managed to add issues which were of particular concern to Nazi Germany to the official programme.⁶⁰ In effect Berber used the ISC as a launch pad to enmesh himself in a transnational network of international relations

⁵⁵ F. Berber, ed., *Locarno: eine Dokumentensammlung*, Berlin: Junker und Dünnhaupt, 1936; F. Berber, ed., *Das Diktat von Versailles: Entstehung, Inhalt, Zerfall. Eine Darstellung in Dokumenten*, Essen: Essener Verl.-Anstalt, 1939. German diplomats commented on the political usefulness of these publications, Politisches Archiv des Auswärtigen Amtes, Berlin (henceforth PA AA), R 43162, Albrecht to Berber, 20 February 1939.

⁵⁶ F. Berber, *Die völkerrechtspolitische Lage Deutschlands*, Schriften der Deutschen Hochschule für Politik, I/21, ed. Paul Meier-Benneckenstein, Berlin: Junker und Dünnhaupt, 1936, pp. 5-24.

⁵⁷ F. Berber, 'Das Völkerrecht in der Außenpolitik', *Hamburger Monatshefte für Auswärtige Politik*, 3, 1, 1936, pp. 3-6, at p. 6.

⁵⁸ PA AA, R 64152, ISC participant list, March 1928; PA AA, R 65746, memorandum Oster, 12 December 1933; Michael Riemens, 'International Academic Cooperation on International Relations in the Interwar Period: the International Studies Conference', *Review of International Studies*, 37, 2, 2011, pp. 911-928.

⁵⁹ F. Chalmers-Wright, *The International Studies Conference: origins, functions, organisation*, Paris: International Institute of Intellectual Cooperation, 1937, p. 44.

⁶⁰ Council on Foreign Relations Archives, Princeton University, box 573, folder 5, James T. Shotwell to Walter Mallory, 1 June 1936.

specialists, spanning the United States, the British Empire and most of Europe, and financed by American philanthropic foundations.⁶¹

Berber established himself and his institutes as the key German interlocutors of this network: he gave lectures at the European Centre of the Carnegie Endowment in Paris and the Royal Institute of International Affairs in London, and invited high-profile speakers to come to Germany, most notably the Institute's Director of Studies Arnold Toynbee in 1936.⁶² Other organisations were also targeted, for instance the Geneva Research Center, an international research institute financed by American foundations.⁶³ As governing board member Berber vetoed inconvenient research (e.g. on sanctions in 1937) and asked "to be consulted in advance concerning all texts which might refer in any way to German policies or activities."⁶⁴ He also objected to commissioning German refugee scholars with writing studies for the centre, thereby ensuring that there would be only one German voice.⁶⁵ Finally, he used his Quaker connections to assemble a small British pro-appeasement circle of influential pacifists, the "Group for Anglo-German Understanding". Although British interest in the group declined from 1935 Berber continued to meet with Quakers in Germany until finally breaking off contact in 1939.⁶⁶ Through his participation in transnational scholarly networks at both personal and institutional levels, Berber became the privileged interlocutor from the Nazi sphere of international law to liberal internationalism. Liberals were interested in this exchange for political and intellectual reasons and committed their own transgressions by engaging in it.

One issue that was particularly salient in this context was colonial appeasement, an attempt led by British liberals to conciliate Nazi Germany with a new colonial settlement in Africa. Berber had consistently demanded international equality for Nazi Germany, declaring at international conferences that "outsiders continued to regard [Germany] ... as a fascist

⁶¹ Katharina Rietzler, 'Of Highways, Turntables, and Mirror Mazes: Metaphors of Americanisation in the History of American Philanthropy', *Diplomacy & Statecraft*, 24, 1, 2013, pp. 117-133, at pp. 125-126.

⁶² Carnegie Endowment for International Peace Centre Européen Archives, Columbia University, New York, box 182, folder 1, Berber to Malcolm Davis, 12 May 1936; Memorandum 22 May 1936; Andrew Crozier, 'Chatham House and Appeasement', in Andrea Bosco and Cornelia Navari, eds., *Chatham House and British foreign policy, 1919-1945: the Royal Institute of International Affairs during the inter-war period*, London: Lothian Foundation Press, 1994, pp. 205-259; Toynbee, *Acquaintances*, pp. 276-285.

⁶³ RF, RG 1.1 series 100, box 5, folder 46, Memorandum of conversations in Geneva, 29-30 August 1935, 6 and 10 September 1935; Tracy B. Kittredge to Sydnor Walker, 12 October 1935, Walker to Kittredge, 30 October 1935.

⁶⁴ RF, RG 1.1 Series 100, Box 5, Folder 46, Kittredge to Walker and John Van Sickle, 18 December 1937; RF, RG 1.1 Series 100, Box 6, Folder 50, Kittredge to Walker, 23 September 1937.

⁶⁵ RF, RG 1.1 Series 100, Box 6, Folder 52, Kittredge to Walker, 30 June 1938.

⁶⁶ Carnall, *Gandhi's interpreter*, pp. 112-117, 128-135.

state, as a totalitarian state or as a dictatorship. It [i]s none of these things.”⁶⁷ If Germany was just like any other European great power it needed colonies which it would administer capably: “if we did do as other nations and accepted this terrible white man’s burden, we should not break down under it.”⁶⁸ Arguments that justified the colonial claims of the Western powers, such as the need for raw materials, were similarly taken apart by Berber who insisted that colonies were a matter of national prestige.⁶⁹ Ribbentrop was fixated on gaining African colonies and Berber likely acted on his orders when he convinced Toynbee to support German colonial claims.⁷⁰ The era of colonial appeasement which had culminated in a British ‘colonial offer’ to Hitler in 1938 ended with Austria’s *Anschluss* and Germany’s dismantling of Czechoslovakia. It now became clear that Germany was not like other European powers and that the empire it sought to build in the East would not be based on negotiation.

Berber’s Second World War began on a triumphant note. Shortly after the fall of France he wrote a letter to a Rockefeller official, advising him that “the situation in Europe has changed considerably and I am sure that even groups and persons who until now had thought that it was possible to do researchwork (*sic*) on the future of the international Organisation of Europe and the world without Germany’s participation have now learned better.”⁷¹ Berber’s output in the first years of the war, apart from several tendentious document editions, was indeed concerned with bolstering a new European order under German leadership.⁷² Firstly, Berber contributed to this project in practical ways as his institute produced a series of strategic memoranda for the German Foreign Ministry (*Materialien zur Neuordnung*) as well as a “Europe handbook”.⁷³ Ribbentrop also put him in charge of the League of Nation’s International Institute for Intellectual Cooperation in Paris,

⁶⁷ League of Nations Archives, Geneva, R4011, Report ‘General Study Conference on Collective Security’, June 1935; for Berber’s role in the broader context of colonial appeasement see Susan Pedersen, *The guardians: the League of Nations and the crisis of empire*, Oxford: Oxford University Press, 2015, pp. 325-347.

⁶⁸ International Studies Conference, *Peaceful change*, Paris: International Institute of Intellectual Cooperation, 1938, 467.

⁶⁹ Berber, *Die völkerrechtspolitische Lage Deutschlands*, p. 8.

⁷⁰ Wolfgang Michalka, *Ribbentrop und die deutsche Weltpolitik, 1933-1940*, Munich: Wilhelm Fink, 1980, pp. 138-149; Crozier, ‘Chatham House and Appeasement’, p. 245.

⁷¹ RF, RG 1.1, 717 S, box 19, folder 178, Berber to Kittredge, 19 August 1940.

⁷² *Europäische Politik 1933-1938 im Spiegel der Prager Akten*, 3rd ed., Essen: Essener Verlagsanstalt, 1942, contained captured documents from the Czechoslovak foreign office with headings such as “the powerful Jewish element in England”, p. 21; *Die amerikanische Neutralität im Kriege, 1939-1941*, Essen: Essener Verlagsanstalt, 1943, was designed to show how Roosevelt subverted U.S. neutrality and introduced a discriminatory concept of war (*diskriminierender Kriegsbegriff* - a Schmittian term), p. 46.

⁷³ PA AA, R 43162, Berber to Albrecht, 29 July 1942; *Deutsches Institut für Aussenpolitische Forschung*, annual report 1942/43.

seat of the ISC secretariat, to implement the New Order on the level of intellectual cooperation.⁷⁴

Secondly, Berber developed a blueprint for the new German empire in articles published in the early 1940s in which he turned to Europeanist rhetoric. After Hitler's attack on the Soviet Union and American entry into the war, Nazi ideologues intensified their attempts to justify the war as one to defend and unite Europe against the twin forces of Bolshevism and Anglo-American imperialism. Although the ulterior motives seemed obvious, this discourse was remarkably successful among some West Europeans such as Hendrik de Man.⁷⁵ Berber himself extolled the Holy Roman Empire as a model for a united Europe, a "community of [the] free peoples" of Western Christendom. Historical German leadership in the Empire, elevated by Berber to "a grave sacrifice in the interest of Occidental unity, more sacrificial than England's proclaimed 'white man's burden' in the dark continent" provided free expression to Europe's peoples in a unified realm and gave the German *Volk* a "universalist heritage" that "plays a special role today". Berber's idealised pluralism camouflaged the radically different ways in which the Nazis treated conquered peoples in Western and Eastern Europe and indirectly justified strategies of enslavement and eradication: "How different is already today the legal situation of the Protectorate, the *Generalgouvernement*, of *Ostland*, of Slovakia, Croatia, Norway, Denmark, France, Hungary, Italy, the *Reich* in an already embryonically existing European New Order!"⁷⁶

He also sought to distinguish himself from Carl Schmitt's *Großraum* concept which he criticised as "too imperialistic", even if Berber adopted other Schmittian terms such as *raumfremde Macht*, a power foreign to a *Großraum*.⁷⁷ Although Berber would later use this divergence as evidence of his anti-Nazi convictions (although he published them at a time when Schmitt had lost much of his influence), it is more likely that he simply threw his hat into the ring of the debates that accompanied the improvised and violent process of building Hitler's empire.⁷⁸ The interesting point about this disagreement beyond the well-documented antipathy between the two jurists consists of Berber's insistence that a Greater Germany ought to try its best to not be perceived as an empire.⁷⁹ Again, the British Commonwealth served as a model as it "wisely avoided giving the leading power Great Britain a title that

⁷⁴ Weber, 'Rechtswissenschaft', pp. 391-393.

⁷⁵ Ute Frevert, 'Europeanizing Germany's twentieth century', *History & Memory*, 17, 1/2, 2005, pp. 87-116, at pp. 100-102.

⁷⁶ F. Berber, 'Epochen europäischer Gesamtordnung', *Donauropa*, 2, 1942, pp. 729-738, at pp. 735, 738.

⁷⁷ Ibid., p. 738; see also F. Berber, 'Die Neuordnung Europas und die Aufgabe der außenpolitischen Wissenschaft', *Auswärtige Politik*, 9, 3, 1942, pp. 189-195.

⁷⁸ LMU, E-II-855, Rolf Seeliger, 'Widerruf', May 1965. Mark Mazower, *Hitler's empire: Nazi rule in occupied Europe*, London: Allen Lane, 2008.

⁷⁹ Schmitt blocked a professorial appointment for Berber in 1934/35, Weber, 'Rechtswissenschaft', pp. 253-254; Stolleis, *History of Public Law*, p. 285.

would have loudly announced it as such”.⁸⁰ Berber’s ideas for a non-coercive European federation under German leadership utterly jarred with reality. He published them at a critical point in the timeline of the Holocaust, just after the mass murder of Europe’s Jews had been planned by the Nazis at the Wannsee Conference. Whether his proposals were a particularly subtle way of registering dissent (as Berber himself claimed after 1945) is hard to ascertain but what is significant about them is the way in which Berber insisted that law, empire and German universalism could be fused together.

Berber himself became increasingly embroiled in the vicious infighting within the polycratic Nazi foreign policy system and decided to pursue his ‘politics of international law’ elsewhere. After a blackmailing attempt by an SS officer who knew about Berber’s involvement with religious internationalism, Berber convinced Ribbentrop to send him to Geneva permanently.⁸¹ Here, Berber turned to humanitarian international law for the purposes of the German war effort as a legal adviser at the International Committee of the Red Cross (ICRC). At Ribbentrop’s behest Berber surveyed prospects for a separate peace with Britain, and initiated an ICRC proposal to establish no-bombing zones for civilian populations which the Allies rejected as Germany would have been the major beneficiary. The basic idea, however, was taken up in the 1949 Geneva Convention.⁸²

Berber also engaged in what he later described as ‘humanitarian missions’ that furnished him with a post-war alibi.⁸³ Attempts to settle in Switzerland after the war failed as the authorities expelled Berber to the French zone of Allied-occupied Germany where he first worked as a defence lawyer and then as a legal adviser to the French military government. In 1949 he emerged from his own de-nazification tribunal as a fellow traveller (*Mitläufer*) but was barred from an academic post.⁸⁴ Berber’s career, for a long time dedicated to the doomed attempt to bring Hitler’s aggressive bid for a race-based empire into alignment with

⁸⁰ Berber, ‘Neuordnung Europas’, p. 194.

⁸¹ PA AA, R 27177, Müller to Berber, 22 April 1942; Reichssicherheitshauptamt to Picot, 7 October 1942.

⁸² Paul Stauffer, ‘Ein Naziagent am Sitz des IKRK?’, *Neue Zürcher Zeitung*, 16 September 1996, p. 15; Berber, *Lebenserinnerungen*, p. 124; James Crossland, ‘A man of peaceable intent: Burckhardt, the British and Red Cross neutrality during the Second World War’, *Historical Research*, 84, 223, 2011, pp. 169-174.

⁸³ Berber, *Lebenserinnerungen*, pp. 126-143; Berber’s claims of having saved 400,000 Hungarian Jews from deportation are grossly inflated, though he did act as a go-between for the ICRC. Jean-Claude Favez, *The Red Cross and the Holocaust*, transl. John and Beryl Fletcher, Cambridge: Cambridge University Press, 1999, pp. 234-247, 262-264.

⁸⁴ Weber, ‘Rechtswissenschaft’, pp. 381, 396-408; Berber, *Lebenserinnerungen*, pp. 159-167; LMU, Sen-I-39, Hueck to Bavarian Ministry for Culture and Education, copy, 13 July 1953; Berber Papers, French military government, letter of protection, 19 October 1945; certificate of registration, 23 June 1947; certificate of denazification, 31 January 1949; Berber’s expulsion was only formally rescinded in 1959: Swiss federal prosecutor’s office to Berber, 30 October 1959. For career trajectories of Nazi jurists after 1945 see Eva Schumann, ed., *Kontinuität und Zäsuren: Rechtswissenschaft und Justiz im “Dritten Reich” und in der Nachkriegszeit*, Göttingen: Wallstein Verlag, 2008.

an approach to liberal international law that took advantage of its internal contradictions, had reached a dead end.

India, international law and new imperial logics

After 1945, the configurations of law and empire shifted again. The ease with which Hitler had broken international agreements and defied international organisations had made the fragility of the post-1919 international legal order painfully obvious. The horrors of the Holocaust and the enormous loss of civilian life during the Second World War underlined international law's failure to protect individual human beings. Nazi rule in Europe and Japan's military successes against the British, French and Dutch empires in Asia irreparably damaged the legitimacy of European colonial rule. By the end of the 1940s, India, Pakistan, Ceylon, Burma, Syria, Jordan and Indonesia were sovereign states intent on using their newly-won status to dismantle the colonial order. International law had to respond to these challenges. It did so, albeit tentatively. The Allied governments established international tribunals in Nuremberg and Tokyo to prosecute Axis war criminals but many lawyers criticised the verdicts as ex-post facto law. Under the aegis of the United Nations, governments committed themselves to upholding human rights but only in the non-binding 1948 Universal Declaration. The UN Charter lacked a firm commitment to decolonization, and its trusteeship system, which replaced the League of Nations mandates, was initially opposed by European powers. Instead of strengthening international law the Allies built the new international order on the basis of power politics.⁸⁵

All this was not lost on Berber. His views on international law in the early Cold War embraced power politics but also toyed with the idea of reforming international law 'from below'. Awaiting his denazification tribunal, he reached out to his old Quaker contacts. One of them visited Berber in Baden-Baden in 1948. Discussing the recent communist takeover in Czechoslovakia Berber asserted that the "country was undoubtedly recognised at Yalta as being within the Russian sphere of influence" and the sovereignty of small nations a casualty of international law's diminished role. But he also recognised that it was necessary to rebuild international law's normative authority which could not be done by discredited European governments. Berber declared that "spiritual power alone can now save the world – the power that is more prevalent in the East, in India and China, evidenced by Gandhi's life and methods, and which is largely lacking in the West", a statement that resonated with a German Orientalist tradition that had often sought to appropriate 'Eastern' traits. Berber's expressed desire to "go to India and co-operate there" with the Quakers represented more

⁸⁵ Mark Mazower, *Governing the world: the history of an idea*, London: Allen Lane, 2012, pp. 209, 250-253; Balakrishnan Rajagopal, *International law from below: development, social movements, and Third World resistance*, Cambridge: Cambridge University Press, 2003, pp. 71-72.

than a careerist's desperate move in a difficult situation.⁸⁶ It also reflected a shrewd understanding of who possessed moral authority in a decolonizing world.

In this new constellation Indians emerged as the most vocal representatives of the anti-colonial cause. They used international institutions as a platform but remained sceptical of international law as it had been shaped by the great powers. When the Indian delegation to the United Nations famously charged South Africa with racial discrimination in the first session of the General Assembly, it did so in contravention of the domestic jurisdiction clause in the charter.⁸⁷ Indian jurists made their mark in the post-war legal order, none more so than Radhabinod Pal, one of the three dissenting judges at the Tokyo International Military Tribunal which opened in 1946. Pal not only denied that the charges brought against the Japanese defendants were legitimate but questioned the motives of the prosecuting powers and argued that outlawing crimes against peace could be used to withhold justice from colonial peoples. As German jurists had done in the interwar years, Pal objected to the use of law for upholding an inequitable status quo.⁸⁸

Of course, both episodes occurred before or shortly after India attained formal sovereignty in 1947. From then on, Indian jurists and policy makers had to wrestle explicitly with what B.S. Chimni has called the "double life of international law". International law conferred formal sovereignty on states emerging from colonialism but continued to exist as a system of rules structured by the standard of civilization. Thus it represented both an instrument of liberation and of domination. Radical alternatives, such as that advanced by Nazi Germany, were utterly discredited after 1945. "Mainstream liberal international law was the only game in town; even the Soviet scholars struggled with it." Like other Third World scholars, Indian jurists tried to reform international law from within, ridding it of its colonial heritage and demonstrating that indigenous traditions aligned with international legal principles. India's foreign policy reflected this dualist relationship with international law as it used international institutions to channel national interests in the absence of military or economic might. At the same time, it retained a critical distance from those same institutions, evidenced, for instance by its role in the Non-Aligned Movement.⁸⁹

⁸⁶ LSF-HA Temp. MSS 577/20, transcript of interview with Berber, 21 and 22 May 1948.

⁸⁷ Mazower, *Governing*, pp. 254-255; on the U.N. see Vijay Prashad, *The darker nations: a people's history of the Third World*, New York: New Press, 2007.

⁸⁸ Kirsten Sellars, *'Crimes against peace' and international law*, Cambridge: Cambridge University Press, 2013, pp. 234-259; Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: a reappraisal*, Oxford: Oxford University Press, 2008.

⁸⁹ B.S. Chimni, 'International law scholarship in post-colonial India: coping with dualism', *Leiden Journal of International Law*, 23, 1 (2010), pp. 23-51, quotes at p. 23; Anand, 'Formation of international organizations', pp. 17-21; Anghie, *Imperialism*, pp. 200-202; on the Soviet Union see Francine Hirsch, 'The Soviets at Nuremberg: international law, propaganda, and the making of the postwar order', *American Historical Review*, 113, 3, 2008, pp. 701-730.

Independent India's attempts to wield normative power within the international system occurred against the backdrop of regional conflict and the politics of the emerging Cold War. The partition of British India had resulted in a violent territorial dispute between India and Pakistan in Kashmir. Britain and the United States generally favoured Pakistan's case, mostly because they regarded the country as an indispensable ally in the conflict with the Soviet Union. After India submitted the Kashmir dispute to the UN Security Council in January 1948 Anglo-American partisanship became evident. Philip Noel-Baker, a leading liberal internationalist in the interwar years and now Britain's representative during the UN discussions, emphatically took Pakistan's side in the Security Council. Nehru deeply regretted taking the dispute to the UN which he regarded as being 'run' by the United States and Britain.⁹⁰ The experience would inform his approach to a related dispute over the use of the Indus canal waters.

The 1947 partition had created two sovereign states and imposed political boundaries onto an interconnected irrigation system providing water from the Indus river system to the agricultural lands of East Punjab (India) and West Punjab (Pakistan). West Punjab depended on water from across the border, as five of the six main tributaries of the Indus rise in India. Initially, temporary agreements regulated the water supply to Pakistan but it became clear that a permanent intergovernmental agreement was needed when the government of East Punjab stopped the supply in 1948. India and Pakistan signed the Inter-Dominion Agreement of May 1948, which released water to Pakistan against payments but the wider conflict between the two states ensured that the dispute remained unresolved.⁹¹ Postcolonial sovereignty turned what would have been a domestic quarrel into an international dispute.

Pakistani officials recognised that international law might offer a way to gain the upper hand in a conflict in which geography was on India's side. In 1949, Pakistan proposed submitting the dispute to the International Court of Justice, another UN body, hoping to better its position resulting from the Inter-Dominion Agreement. India categorically refused to involve the Court.⁹² But Pakistan attempted to mobilise other institutions in its favour. In October 1949, Pakistan submitted a draft resolution to the Sixth (Legal) Committee of the UN calling upon the International Law Commission to include the topic of international rivers

⁹⁰ Guha, *India after Gandhi*, pp. 72-73.

⁹¹ Undala Z. Alam, 'Questioning the Water Wars Rationale: A Case Study of the Indus Waters Treaty', *Geographical Journal*, 168, 4, 2002, pp. 341-353; Miriam R. Lowi, *Water and power*, Cambridge: Cambridge University Press, 1995, pp. 61-67; Charles H. Heimsath and Surjit Mansingh, *A diplomatic history of modern India*, New Delhi: Allied Publishers, 1971, pp. 130-138.

⁹² Undala Z. Alam, 'Water Rationality: Mediating the Indus Water Treaty', PhD thesis, Durham University, 1998, pp. 160-161, 322.

in its list of topics for codification.⁹³ Although the resolution was not adopted, involving the International Law Commission was a way of getting international legal experts drawn into the issue. The Indian government was acutely aware of these efforts. A transcript of the Sixth Committee's meeting minutes is preserved in the Indian National Archives, along with detailed instructions on how to publicly refute Pakistan's invocations of international law.⁹⁴ Indian foreign policy was now presented with a delicate problem: how to reject claims made under international law by another postcolonial nation.

The nature of this task explains Berber's move into the heart of Indian foreign policy in the early 1950s. As in the 1930s, his Quaker connections were crucial. After the Second World War the Quakers founded humanitarian 'embassies' in strategic points, one of them being Calcutta.⁹⁵ A close Quaker friend of Berber's, Horace Alexander, was heavily involved in the politics of postcolonial India and went on several fact-finding missions to Kashmir between 1948 and 1950, reporting directly to Nehru.⁹⁶ Alexander also became concerned with the canal waters dispute.⁹⁷ As the conflict took on a legal dimension, he saw an opening for Berber. In November 1950, three months after Pakistan declared the Inter-Dominion Agreement null and void, Alexander approached the Governor-General of India, who was looking for a specialist in the law of international waterways. Berber did not fit this description but Alexander praised his legal expertise and personal commitment: "he is not merely trying to run away from a difficult situation, but he sees an opportunity of serving the cause of peace and goodwill."⁹⁸ In January 1951, Berber accepted the Indian government's offer to go to New Delhi as a legal adviser.⁹⁹

Outwardly an odd choice, Berber was particularly suited to the job. He understood intra-imperial relations as a part of international law which sensitised him to the pre-Partition complexities of the dispute. India's post-independence foreign policy strove to establish the country as a 'moral power', even if Nehru remained conscious of the limits of moral capital in international politics.¹⁰⁰ Thus India could not afford to be seen flouting international law and needed an adviser adept at juggling legal concepts and political realities. As a German, Berber remained sufficiently remote from the interests of the former colonial power, or the

⁹³ UN General Assembly, Sixth Committee, 166th meeting, 17 October 1949, A/C.6/SR.166, paragraph 82.

⁹⁴ National Archives of India, New Delhi (henceforth NAI), Ministry of External Affairs, Branch: External Publication, 6/1/7 – XP(P)/49, 'Directive on Canal Water Dispute between India and Pakistan – secret'.

⁹⁵ Robert Byrd, *Quaker ways in foreign policy*, Toronto: University of Toronto Press, 1960, p. 153.

⁹⁶ NAI, Ministry of States, Branch: Kashmir, File 7(58)-K, 1950, *passim*.

⁹⁷ Nehru Memorial Museum and Library, New Delhi, Horace Alexander Papers, Agatha Harrison Correspondence, file 5, Alexander to Agatha Harrison, 11 April 1953.

⁹⁸ LSF-HA Temp. MSS 577/20, Alexander to Bajpai, 28 December 1950 (copy); Lowi, *Water and Power*, 64.

⁹⁹ LSF-HA Temp. MSS 577/20, Berber to Alexander, 13 January 1951.

¹⁰⁰ Priya Chacko, *Indian foreign policy: the politics of postcolonial identity from 1947 to 2004*, London: Routledge, 2012, chapters 1-3; Manu Bhagavan, 'A New Hope: India, the United Nations and the Making of the Universal Declaration of Human Rights', *Modern Asian Studies* 44, 2, 2010, pp. 311-347.

United States, which in the early 1950s laid the groundwork for a military alliance with Pakistan. At the same time, West-Germany established closer ties with India, the key country in its attempt to persuade developing countries not to extend diplomatic recognition to the GDR.¹⁰¹ When Berber eventually returned to a German professorship, his appointment was supported by the West-German ambassador in New-Delhi who stressed that it would bolster FRG-Indian relations as well as “our interests globally”.¹⁰² Like other experts at this time Berber went to ‘help’ India as a representative of the West, an inherently Eurocentric move. However, this West was less unified than many Cold Warriors would have liked to believe.

India’s strategy in the canal waters dispute focused on achieving a political solution while seizing the moral higher ground, an objective complicated by the increased interweaving of international law with developmental logics. In a 1951 article the New Dealer David Lilienthal alerted the American public to the dispute. His call to internationalise and develop the water resources of the Indus river system involved the World Bank which offered its good offices for mediation. This was an American attempt to find a ‘technical’ solution to the problem, modelled on the Tennessee Valley Authority in the United States. Ultimately, though, the World Bank discussions did not result in internationalisation but an affirmation of state sovereignty. The trilateral negotiations which began in 1952 only resulted in a treaty between India and Pakistan in 1960 as both countries presented irreconcilable plans for the economic development of the Indus basin. In the end, the tributaries were divided between India and Pakistan with new canals giving both countries additional access to water. Major building projects were to be financed by an Indus Basin Development Fund, which the World Bank, co-signatory to the treaty, set up.¹⁰³

As part of the Indian World Bank delegation Berber stressed that the preamble to an eventual treaty should highlight the moral dimension of the case. Such invocations of morality were strategic, as a letter Berber wrote to Arnold Toynbee in 1953 suggests: “Fundamentally, the situation of my present task is not altogether different from former tasks. Lip service to Gandhian principles combined with Neo-Asian Machiavellism is not an altogether enviable situation.”¹⁰⁴ But Berber also decided to use elements of the post-1945

¹⁰¹ Paul McGarr, *The Cold War in South Asia*, Cambridge: Cambridge University Press, 2013; Amit Das Gupta, *Handel, Hilfe, Hallstein-Doktrin: Die bundesdeutsche Südasienspolitik unter Adenauer und Erhard 1949 bis 1966*, Husum: Matthiesen, 2004. The fractious relations between India and Pakistan paralleled those between the FRG and the GDR but this was not a connection Berber made.

¹⁰² Ernst Wilhelm Meyer to Hans Reinfelder, 20 February 1953, LMU, Sen-I-39.

¹⁰³ David Lilienthal, ‘Another Korea in the Making?’, *Collier’s*, 4 August 1951, pp. 22-23, 56-58; Daniel Haines, ‘(Inter)Nationalist rivers?: cooperative development in David Lilienthal’s plan for the Indus Basin, 1951’, *Water History*, 6, 2, 2014, pp. 133-151.

¹⁰⁴ Bodleian Library, Oxford, Arnold Toynbee Papers (uncatalogued), box 13, 3 November 1953; Alam, ‘Water Rationality’, pp. 197-198, 213-214.

legal imaginary, which divided the world into developed and under-developed nations, to bolster India's claims.

As the dispute went on, Berber presented India as a potential poster child for Third World development. "In view of the large undeveloped areas in the Indus basin in an India subject to famine, the acute food shortage in the above mentioned Indian regions of the Indus system and the disproportionately low utilization in India of the waters of the Indus system available in her territory, India is vitally interested in increasing her present utilization, whilst Pakistan ... not only wishes to maintain its existing utilization but also to increase this considerably."¹⁰⁵ Thus, India's greater needs for development should take priority. However, slotting India into a developmental hierarchy entailed accepting Western epistemologies that linked sovereignty to economic growth.¹⁰⁶ Berber's arguments indirectly affirmed India's inferiority in a Eurocentric international legal system, even while they attempted to secure political advantage.

This is also apparent in other writings in which Berber criticised Anglophone authors for dismissing the international law of ancient India as not 'real': "considering the indelibly linked unity of law, morality and religion in the old Indic codes... the old Indian law of nations had a higher chance of being adhered to than modern international law". Western international law's failings were apparent as it had allowed the bombing of civilians (in Nazi Germany) and the use of atomic weapons (against Japan) and was fundamentally rooted in colonial conquest. Only the "fanatical Mohammedans of the Near East and the xenophobic Mongols of the Far East were able to assert their independent statehood against European colonialism" while "the mild, nonviolent believers in international law, the peoples of the Indian *Kulturwelt* on the continent and the islands became the prey of European conquerors". Fusing Orientalist stereotypes with a critique of Western international law, Berber argued that a moribund European colonialism, "a conception in international law which was from the beginning irreconcilable with the vital rights of non-European peoples", now had to give way to a new order based on different values, such as *ahimsa*, the old Indic principle of non-violence.¹⁰⁷ Whether Berber truly thought Eastern values would triumph remains doubtful but his appropriation of them is significant.

Meanwhile liberal international law really was the only game in town. Western institutions remained prominent in another soft power strategy used by India in the water dispute, namely influencing the emerging scholarly consensus on the substance of

¹⁰⁵ F.J. Berber, 'The Indus Water Dispute', *Indian Year Book of International Affairs*, 6, 1957, pp. 46-62 at p. 48.

¹⁰⁶ Pahuja, *Decolonising international law*, pp. 71-72, 84-85.

¹⁰⁷ F.J. Berber, 'Indien und das Völkerrecht', in H.O. Günther, *Indien und Deutschland*, Frankfurt a.M.: Europäische Verlagsanstalt, 1956, pp. 228-235, at pp. 229, 233, 232. Berber criticised Arthur Nussbaum's – a Jewish refugee from Nazism – *Concise History of the Law of Nations* (1947).

international water law. A focal point here was the International Law Association (ILA), an influential non-governmental body founded in 1873, during the highpoint of imperial international law. In 1954 the ILA created a special river law committee on which India and Pakistan both had several representatives and which included the American John Laylin, Pakistan's legal adviser in the canal dispute. Unsurprisingly, the Indians argued that states should be free to develop their water use according to their needs while the Pakistanis emphasized the priority of existing uses.¹⁰⁸ Berber also joined the committee and published a book in which he argued that there was no such thing as a global customary water law. Any future law would have to be based on the outcome of political negotiations: "The motley diversity exhibited by water treaties is nothing other than a reflection of the motley diversity of international relations in general."¹⁰⁹ Thus he prepared the ground for the eventual treaty.

After securing a professorship in Munich in 1954, Berber continued to work for the Indian government, influencing the ILA rivers committee.¹¹⁰ An opinion he submitted to the ILA in 1957 (which was circulated by the Indian foreign ministry to its missions) reiterated the unsettled nature of international water law in a world which had only recently recognised the sovereign equality of many nations.¹¹¹ The political purpose behind Berber's treatise was to delay agreement within the ILA on the rules of river law before Pakistan finally agreed to sign the Indus Water Treaty in 1960. The ILA only adopted the Helsinki Rules on international river law in 1966, a compromise between the Indian and Pakistani positions. Berber's scholarly offensive ensured that state practice, i.e. the outcome of concrete negotiations between India and Pakistan, would shape future legal principles and not vice versa.

Conclusion

At the end of his career, Friedrich Berber was thoroughly integrated into West-Germany's intellectual and political mainstream as well as the international legal community through his continued membership in the ILA. Newspaper articles honoured him as a member of Munich's academic elite, a trustee of a prestigious endowment for gifted students, and a valued advisor to the Indian government.¹¹² Occasionally he issued subtly subversive statements challenging the idea that the Federal Republic was an integral part of the 'West'

¹⁰⁸ Charles S. Bourne, 'The International Law Association's contribution to international water resources law', *National Resources Journal*, 36, 2, 1996, pp. 155-216.

¹⁰⁹ Friedrich Berber, *Die Rechtsquellen des internationalen Wassernutzungsrechts*, Munich: Oldenbourg, 1955; in English translation: *Rivers in international law*, London: Stevens & Sons, 1959, p. 273.

¹¹⁰ 'Münchener Lehrstuhl für Ribbentrops Völkerrechtler', *Abendzeitung*, 291, 8 December 1955, p. 5. Berber's integration into West-German academia deserves its own treatment but see LMU, Sen-I-39, L-X-3a, Bd.4.

¹¹¹ NAI, Ministry of External Affairs, UNES CG/17/61: Canal waters, 'Methodological considerations concerning the study on the uses of the waters of international rivers', 15 September 1957. Thanks to Daniel Haines for sharing this source.

¹¹² 'Friedrich Berber zum 75. Geburtstag', *Münchener Merkur*, 28 November 1973; 'Friedrich Berber zum 80. Geburtstag', *Süddeutsche Zeitung*, 27 November 1978.

under American leadership, for instance when he compared Germany's dependent status after 1945 to that of a mandate under the League of Nations.¹¹³ He also revisited the Holy Roman Empire as a model for international integration under German leadership, suggesting that it offered valuable lessons to a world divided by the Cold War.¹¹⁴ Such comments went against the grain not so much of an international law capable of underpinning imperial orders but against the Anglo-American privilege of writing the rulebook. But for all the attacks on liberal international law Berber had launched in the course of his long life, he did not turn his back on it.

This was because, fundamentally, Germans occupied a privileged position in a Eurocentric international legal order as they were both part of the West and not. Ideas of civilizational hierarchies lingered on in the post-1945 era which was marked by sovereign independence *and* inequality. Berber's broadsides against European colonialism notwithstanding, while he posed as an oppositional international lawyer he behaved like a typical Cold War technocrat, acting as the imperial logic of international law would predict. His insistence on the primacy of politics and the 'ruse' of international law made him accept developmental logics which positioned India as an aspiring nation not yet possessing full sovereignty. The very idea of Berber tutoring Indians in how to game the rules of international law confirmed that those were the only relevant rules. Berber's actions were underpinned by a belief in civilizational hierarchies and a deep-seated Orientalism which dwelled on 'timeless' Indian values and idealised Ghandi, only to be disappointed when confronted with Nehruvian power politics. The fact that he hardly changed any of his core arguments during his career, the primacy of politics in international law, the importance of spiritual values, the disruptive potential of the subaltern, underlines that it was possible for Berber to simultaneously participate in racist and imperial projects *and* resist being subsumed within a uniform, hegemonic discourse of Western international law.

Is there no escape from imperial international law? In the case of this jurist who chose to analyse the international system from the perspective of two disruptive powers the answer is no. At historically specific junctures both Indians and Germans believed that international law was structured in a way which stacked the odds against them but also that these structures could be broken up and remoulded according to radically different norms. This attitude is visible in the Nazi's murderous attempt to build a New Order in Europe as well as India's insistence that it would be possible to shape the international system according to alternative logics that bypassed Cold War realities. In both cases, ideas about order were inextricably linked to their legal expressions and operated in a system of power in

¹¹³ Friedrich Berber, *Lehrbuch des Völkerrechts*, vol. 1, Munich: Beck, 1960, p. 243.

¹¹⁴ F.J. Berber, 'International Aspects of the Holy Roman Empire after the Treaty of Westphalia', *Indian Year Book of International Affairs*, 13, 2, 1964, pp. 174-183.

which Western norms were at the centre. And in both cases, the actors wanted to usurp the normative power of Western international law, not abolish it. Searching for the critical instability at the heart of international law, we might be well advised to look sideways, not so much at an opposition between West and rest but at the long continuities of empire, power differentials, racism, and civilizational hierarchies which create a much more complex and contradictory ordering.